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In The

Supreme Court of the United States

October Term, 1978

No. 78-901

MR. ANDREW WOODS,

Petitioner,

v.

SAFEWAY STORES, INC.,

Respondent.

On Petition for a Writ Of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

I. QUESTION PRESENTED

Did the trial court clearly err when it found that Safeway's "no beard" rule did not violate Title VII due to the business justification for Safeway's grooming code and the absence of any substantial racial impact?

II. STATEMENT OF THE CASE

The record reveals only two individuals who have ever claimed to be medically unable to comply with Safeway's "no beard" policy—one white man and one black man. Safeway excused the white employee from complying with the policy for several weeks due to his physician's advice that he not shave due to a skin irritation. The only other Safeway store employee permitted to grow a beard in the Richmond Division is Andrew Woods, the petitioner in this case. Woods worked with a beard from January 30, 1974 to June 10, 1974.

Prior to working at Safeway, Woods wore a mustache, goatee, and mutton chop sideburns as a matter of personal preference. During this period, he controlled his facial hair by using electric clippers or a chemical depilatory, "Magic Shave," without adverse effect.

On the evening of his first day at Safeway, Woods had his beard removed by barber's clippers and controlled his beard for several weeks by occasional "trims" without adverse effect. However, after using a series of other methods to remove his beard—straight razor, electric razor, and chemical depilatory, Woods developed *pseudo folliculitus barbae* ("PFB"), or "razor bumps."

PFB results from ingrown hairs in the beard area of the face and neck. Regular shaving with a sharp blade usually precipitates the condition. In especially curvy hair the sharpened end of the hair follicle imbeds itself in the skin.

Treating PFB requires removal of the hair follicles from the skin, either by removing each entrapped hair individually or by growing a beard "until irritation subsides," usually thirty to sixty days. (Findings of Fact and Conclusions of Law of District Court; Appendix C to Petition for Writ of Certiorari, page 15a). Because of the nature of PFB, a

permanent beard will assure that the hairs will not again penetrate the skin. But individuals can utilize other means of controlling their facial hair and still avoid PFB. Two of plaintiff's expert witnesses, Doctors Skipworth and Alexander, testified that following growth of a 30 day beard to heal his "razor bumps," an individual with PFB could control his beard by means of depilatories, electric clippers, or other devices.

Upon developing "razor bumps," Woods sought out his personal physician, Dr. Watkins, who advised him to grow a beard. Safeway permitted Woods to continue working in the store on the assumption that this condition was temporary. When Dr. Watkins advised that Woods would have to continue growing his beard for an indefinite period of time, Safeway advised Woods that he could no longer work in the store with a beard. Safeway offered Woods a position in Safeway's warehouse, where employees may wear beards. Woods declined this position.

With the assistance of his union, Woods protested his discharge through the grievance/arbitration procedures of his collective bargaining agreement. After reviewing Woods' claim of medical disability and the background of the grooming standard, the arbitrator upheld Safeway's action. After this decision—and 203 days after his discharge—Woods filed a charge of employment discrimination with the Equal Employment Opportunity Commission. This suit followed.

On the day this case was tried, Woods wore no beard and fully complied with Safeway's grooming standard, except for his mutton chop sideburns. Dr. Alexander, one of three dermatologists called by Woods, testified that Woods had been shaved or clipped about six or seven times within a few weeks prior to trial. Woods testified that he "was ordered by

Dr. Alexander to shave so that when I come to court today it will be neat and people could see it, so the judge and whoever else was present could notice it."

Indeed, Dr. Alexander's testimony indicated that he did not share the view that Woods was physically unable to control his beard:

BY MR. OAKEY:

> Q. If you shaved him the first time—you suggested he shave the first time and see how—to see if that would work. Why did you have him—why [did] he get clipped the second time?
>
> A. I really don't follow you.
>
> Q. How many times has he been shaved or clipped in the last couple of weeks?
>
> A. To my knowledge, about six or seven, possibly in the last couple of weeks.
>
> Q. Is that the number of times you would have him clipped, or would you do it one time and see how it develops?
>
> A. Every other day is a reasonable approach to this.

Dr. Alexander also testified that in the event that Woods was unable to accommodate his beard with electric clippers, he should, following growth of a 30-day beard, attempt to use a chemical depilatory. Woods admitted in his testimony that Dr. Alexander had reached no conclusion with respect to whether or not he would be able to shave in the future.

Indeed, with the exception of Dr. Watkins, the physician who first treated Woods, the doctors who testified at trial, including two of Woods' own witnesses, agreed that individuals with PFB could accommodate themselves to a "no beard" policy if they chose to do so. This was particularly true if the employer permitted the growth of a temporary beard, as Safeway did.

Dr. Murrell testified that PFB was unquestionably a minor ailment which need not require the growth of a permanent beard since facial hair could be controlled by techniques which did not aggravate this condition. Dr. Skipworth, called by Woods, admitted that it was rare that an individual could not accommodate to a "no beard" policy, and that facial hair could be removed by ways that did not induce or aggravate PFB. Dr. Alexander not only testified that individuals with PFB could accommodate to a "no beard" policy, he indicated by his own advice to Woods that the petitioner in the instant case was capable of controlling or removing his facial hair.

The testimony of these three dermatologists contrasted sharply with that of Dr. Watkins, who had stressed that Woods "could not solve his problem except by allowing his beard to grow." However, Dr. Watkins admitted that when he advised plaintiff to continue his beard, he was not aware that Woods had previously controlled the growth of his facial hair by means of electric clippers and depilatories.

Based on the medical evidence in the case, the trial court found that "the degree of impact of the employment practice in question is slight." Despite the substantial numbers of blacks employed by Safeway, the court found Woods the only black individual who appeared to have been affected by the "no beard" policy. The court found that the business justification for the "no beard" rule overrode any slight racial impact that might result from the rule. Dismissing Woods' claim of employment discrimination, the court entered judgment for Safeway.

Because the Court of Appeals for the Fourth Circuit affirmed the judgment of the district court with respect to the merits of Woods' case, the Court of Appeals did not reach the question whether Woods' EEOC charge, filed 203

days after his discharge, met the jurisdictional requirements of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000 e-1, *et seq.*

III. ARGUMENT

Woods essentially asks this Court to reverse findings of fact made "fully and carefully" by the trial judge after full trial on the merits and affirmed, *per curiam,* by a unanimous panel of the court of appeals. (Opinion of Court of Appeals, Appendix A to Petition, page 2a.) The decision below does not conflict with decisions of this Court or of any other court of appeal. Indeed, this is the first and apparently only published decision considering this issue, despite the prevalence of similar grooming standards throughout this country. Woods concedes that he knows of no other blacks aggrieved by Safeway's policy.

Griggs v. *Duke Power Co.,* 401 U.S. 424, 431 (1971) held that a *prima facie* case of discrimination could be established, even in the absence of intent, if a facially neutral policy were "invidiously to discriminate on the basis of racial . . . classification." *See also General Electric Co.* v. *Gilbert,* 429 U.S. 125, 137 (1976). However "one complaining of unintentional discrimination due to employment qualifications must [first] show that the challenged standard operates to disqualify members of a protected group of job applicants to which the complainant belongs at a 'substantially higher rate' than other groups of applicants." *Coopersmith* v. *Roudebush,* 517 F.2d 818, 822 (D.C. Cir. 1975). "It is clear that this initial burden to show discriminatory effect is on the party challenging the job qualification." *Id. See also General Electric Co.* v. *Gilbert, supra,* 429 U.S. at 137 footnote 14 (1976); *Harper* v. *Transworld Airlines, Inc.,* 525 F.2d 409, 414 (8th Cir. 1975).

Neither the evidence nor the findings of fact suggest that the "no beard" policy disqualifies blacks at a higher rate than whites. The evidence reveals that only two individuals had experienced medical difficulties in complying with the "no beard" policy—one white and one black. Both were permitted to grow temporary beards in a effort to obtain remission of their difficulties.

Woods bases his claim of discriminatory effect solely on the incidence of PFB in black males, not on any evidence that Safeway's grooming policy has tended to exclude blacks. But the mere fact that PFB is more common in blacks than whites does not establish a *prima facie* case of discrimination. Woods was not discharged because he suffered from PFB, but because he failed to comply with Safeway's grooming standards.

In *General Electric Co.* v. *Gilbert, supra,* this Court described the burden the plaintiff must meet to establish discrimination under the "disparate impact" test. The Court noted that the plan in *Gilbert* treated male and female employees alike by covering exactly the same categories of risk. *Id.* at 138. "[N]either is there a finding, nor was there any evidence which would support a finding, that the financial benefits of the Plan 'worked to discriminate against any definable group or class in terms of the aggregate risk protection derived by that group or class from the program.' " *Id., quoting Geduldig* v. *Aiello,* 417 U.S. 484, 496 (1974). *Gilbert* teaches that the overall effect of the employment policy must be examined. Woods focuses on the incidence of a single medical problem and ignores that overall Safeway's uniform grooming policy has not adversely affected any racial group.

On the facts of this case, it is sheer fantasy for petitioner to assert that uniform enforcement of Safeway's grooming

standard constitutes "invidious discrimination" against blacks. "Even a completely neutral practice will inevitably have *some* disproportionate impact on one group or another. *Griggs* does not imply, and this Court has never held, that discrimination must always be inferred from such consequences." *City of Los Angeles* v. *Manhart*, ... U.S. ....., 98 S.Ct. 1370, 55 L.Ed.2d 657, note 20 (1978). (Emphasis in original.)

The decision below is consistent with *Griggs, Gilbert,* and decisions of courts of appeal of other circuits. *Smith* v. *Olin Chemical Corp.*, 555 F.2d 1283 (5th Cir. 1977) held that Title VII permitted a company to discharge a black employee because of a back condition caused by sickle cell anemia, a blood disease found almost exclusively in blacks. The majority affirmed a grant of summary judgment for the employer. Even the dissent thought the plaintiff would have to show more than just a connection between race and bad backs:

> It would be necessary for him to bring forward evidence that sickle cell anemia produces bad backs in a high proportion of blacks and that substantially more blacks than whites were fired for bad backs (however caused).

Id. at 1290.

In this case, there is no evidence that blacks tend to have beards more than whites. The evidence shows that whites as well as blacks can have medical reasons for growing beards and can have skin ailments that interfere with their employment.

Moreover, the evidence overwhelmingly supports the trial court's finding that persons with PFB can comply with Safeway's grooming standard. Although one cannot fault Woods for following the advice of his doctor, neither can one conclude that this advice warrants a finding that Safeway's grooming standards violate Title VII.

In its Richmond Division alone, Safeway employs hundreds of black males presently complying with the grooming standard. Woods is the first and only black employee to claim that he is physically unable to comply with the rule.

Safeway's grooming standard, unlike that generally imposed by the military, does not demand the type of close shaving most irritating to PFB. Woods complied with Safeway's standard for weeks without adverse effect by merely clipping his beard. Safeway conducts no formal "inspections" of its store employees and detected Woods' beard only several weeks after he had ceased all efforts to control it. Indeed, the evidence suggests that Safeway's grooming standard imposes greater burdens on whites than blacks, whose dark skin more readily conceals a beard.[1]

The district court, who could observe Woods and evaluate the medical testimony firsthand, clearly did not view PFB as a serious impediment to employment. The fact that Woods removed his beard six or seven times during the weeks prior to trial demonstrates this strikingly.

Expert testimony and exhibits in the record below fully support the trial court's finding that the "business purpose" for the "no beard" rule overrides any slight discriminatory effect that the policy may have. The grooming code reasonably and effectively carries out these business purposes by regulating only the appearance of public contact employees.

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[1] At trial, it appeared that one black employee at Woods' former store, without knowledge of the store manager, had grown a small, barely visible tuft of hair, or "fly," under his lower lip. Contrary to the assertion at page 10 of petitioner's brief, this incident only underscores that Safeway does not enforce its grooming code with the exacting scrutiny of a drill sergeant.

Safeway has exhausted all acceptable alternative approaches to accommodating Woods' unique medical problems.

It is the function of the district court to determine the reasonableness of such an employment qualification, so long as its ruling is based on findings of fact which are not clearly erroneous. *Condit* v. *United Air Lines, Inc.*, 558 F.2d 1176 (4th Cir. 1977), *cert. denied*, 435 U.S. 934 (1978). The district court's opinion demonstrates that it understood the interests to be weighed in determining whether this grooming standard was job related. Woods' failure to show any substantial discriminatory effect of the "no beard" rule was the key to its finding.

The ruling below is consistent with decisions from other courts of appeal. In *Smith* v. *Olin Chemical Corp.*, 555 F.2d 1283 (5th Cir. 1977), the Fifth Circuit, sitting *en banc*, held that an employer's exclusion of a black employee with a bad back did not have to be justified by evidence of business necessity, even though the practice allegedly had a disparate racial impact since the bad back resulted from the racially-linked condition of sickle cell anemia. The court reasoned that the business necessity of a good back could be *presumed* and affirmed dismissal of the discrimination claim on summary judgment. *See also Townsend* v. *Nassau County Medical Center*, 558 F.2d 117 (2nd Cir. 1977) *cert. denied*, 434 U.S. 1015 (1978).

Smith v. *Delta Air Lines, Inc.*, 486 F.2d 512 (5th Cir. 1973) affirmed a district court's ruling that even though blacks might have difficulty in conforming to a company's rule prohibiting facial hair, the rule did not violate Title VII.[2] Judge Tuttle observed that "[w]e review findings of fact in Title VII cases in the same manner as other fact

[2] It is significant that the black plaintiff in *Smith* never claimed that any blacks were physically unable to comply with this rule.

findings of the court are reviewed." *Id.* at 514. *See also Spurlock* v. *United Airlines, Inc.*, 475 F.2d 216, 219 (10th Cir. 1972) (college degree required for pilots).

Despite the hyperbole of opposing briefs, this case turns on its own facts and presents no issues of importance to persons other than the parties. The absence of reported cases on this question demonstrates that PFB presents no serious problem in private industry and raises no legal questions warranting this Court's consideration.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of January, 1979, three copies of the foregoing Brief in Opposition were mailed by first class mail, postage prepaid, to each of the following: Robert B. Fitzpatrick, attorney for petitioner, 1707 N. Street, N.W., Suite 300, Washington, D. C. 20036; Lawrence S. Blumberg, Esq., counsel for National Medical Association, One Rockefeller Plaza, Suite 1915, New York, New York 10020; and John W. Garland, counsel for National Black Veterans Organization, Center for Law and Social Policy, 1751 N Street, N.W., Washington, D. C. 20036.

/s/ J. Robert Brame, III